Case Nos. 18-3133 and 18-3134

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN WAYNE FISH, et al.,
Plaintiffs-Appellees

v.

KRIS KOBACH,
in his official capacity as Secretary of State for the State of Kansas,
Defendant-Appellant

PARKER BEDNASEK,
Plaintiff-Appellee

v.

KRIS KOBACH,
in his official capacity as Secretary of State for the State of Kansas,
Defendant-Appellant

REPLY BRIEF

Appeal from the United States District Court for the District of Kansas
Honorable Julie A. Robinson, Chief United States District Court Judge
Case Nos. 16-2105-JAR/JPO and 15-9300-JAR/JPO

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GLOSSARY

Defendant-Appellant offers the following glossary of terms and citation conventions used in this brief.

COURT DOCUMENTS, TERMS, AND OTHER ITEMS	
Fish I	*Fish v. Kobach*, 840 F.3d 710 (2016).
Inter Tribal	*Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).
J.A.	The parties' Joint Appendix, Volumes 1-53.
NVRA	The National Voter Registration Act of 1993, 52 U.S.C. § 20501 *et seq.*
Opening Br.	The State's Opening Brief filed on September 28, 2018.
Response Br.	Plaintiffs-Appellees' Response Brief filed on November 29, 2018.
Section 5	Section 5 of the NVRA, codified at 52 U.S.C. § 20504. Originally codified as 52 U.S.C. § 1973gg-3.
Section 8	Section 8 of the NVRA, codified at 52 U.S.C. § 20507. Originally codified as 52 U.S.C. § 1973gg-6.

ARGUMENT

The Voter Qualifications Clause of the United States Constitution gives States exclusive authority not only to set voter qualifications, but also, as the Supreme Court recognized, to obtain information necessary to enforce them. The Kansas Constitution limits voter eligibility to United States citizens. Thus, the Kansas Legislature enacted a law requiring those seeking to vote to provide documentary proof of citizenship, typically through a birth certificate, in order to vote.

Although a birth certificate is required for numerous endeavors, Plaintiffs contend that Kansas may not require one when protecting the integrity of its elections. They argue that it is too onerous and presumptively unnecessary. The first argument already has been rejected by the Supreme Court in *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181 (2008), and the second is inconsistent with text of the NVRA and the Constitution's Voter Qualifications Clause.

Because the State of Kansas has a sovereign duty and constitutional authority to protect the integrity of elections, the District Court's judgment should be reversed.

I. Kansas's proof of citizenship law does not unduly burden the right to vote.

A. The only remaining plaintiff with an equal protection claim lacks standing.

Parker Bednasek does not dispute he is the only remaining plaintiff with a claim that the Kansas proof of citizenship law unduly burdens his right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment. His attempt to manufacture standing falls short for two reasons.

1. Bednasek was not a Kansas resident when he tried to register to vote.

Because Bednasek was not a Kansas resident in the fall of 2015, he was not qualified to register to vote and therefore lacks standing. The State has not conflated the various residency tests Bednasek cites in his response. Response Br. at 55. The only test cited in the State's Opening Brief is the one Bednasek agrees applies—the one in Kan. Stat. Ann. § 25-407 that applies to voting. It requires Bednasek to establish "not only physical or bodily presence" in Kansas, but also "the intention to abandon [his] old residence" in Texas and "adopt another in [Kansas], either *permanently or indefinitely*." *Willmeth v. Harris*, 403 P.2d 973, 978 (Kan. 1965) (emphasis added). Bednasek attempts to use the other

residency tests as a diversion to distract the Court from considering the totality of his conduct, which does not demonstrate intent to remain in Kansas.

Bednasek's actions speak louder than his words and undermine his claim to Kansas residency. *After* Bednasek tried to register to vote in Kansas in the fall of 2015, he got a Texas driver's license, J.A. 9361, re-registered his car in Texas, J.A. 9365, continued to pay out-of-state tuition at the University of Kansas, J.A. 9361, returned to Texas when school was not in session, J.A. 9344, and kept important documents like his birth certificate at his home in Texas, J.A. 9368-9369. Far from being "irrelevant," Bednasek's actions—and not the self-interested statements of a plaintiff recruited to manufacture a lawsuit—are precisely what Kansas courts consider in determining Kansas residency. *See State ex rel. Parker v. Corcoran*, 128 P.2d 999, 1003 (Kan. 1942) (judging a person's residence based on "acts" and "intentions"); *Gleason v. Gleason*, 155 P.2d 465, 467 (Kan. 1945) (considering "conduct and other circumstances" to determine residence).

Besides, Bednasek's suggestion that the residency requirement for in-state tuition is stricter than the residency requirement for voting is

wrong. Adult students (like Bednasek, who was 19 or 20 in the fall of 2015, J.A. 9334, 9346) at state universities in Kansas are "residents for fee purposes" if they "have been domiciliary residents of the State of Kansas . . . for at least 12 months prior to enrollment for any term or session." Kan. Stat. Ann. § 76-729(a)(1); *see also id.* § 38-101 (defining minors as anyone younger than 18). A "domiciliary resident" is "a person who has [a] present and fixed residence in Kansas where the person intends to remain for an indefinite period and to which the person intends to return following absence." *Id.* § 76-729(d)(4); *see also* Kan. Admin. Regs. § 88-3-2 ("A person shall not be considered a resident of Kansas unless that person is in continuous physical residence, except for brief temporary absences, and intends to make Kansas a permanent home, not only while in attendance at an educational institution, but indefinitely thereafter as well."). This is no different than what the residency requirement for voting requires—regular physical presence plus intent to remain permanently. *See* Kan. Stat. Ann. § 25-407; *Willmeth*, 403 P.2d at 978.

Bednasek paid out-of-state tuition all four years he was at the University of Kansas, even though he claims to have been a Kansas

resident since at least the fall of his sophomore year. J.A. 9361. The fact that Bednasek paid non-resident tuition may not *dictate* a finding that he is a nonresident for purposes of voter registration. *See* J.A. 11824. But it is strong evidence of Bednasek's intent not to permanently reside in Kansas, which is required to establish residence for voting. That, coupled with the rest of his actions detailed in the State's Opening Brief (at 22-23) and above, defeat Bednasek's claim to standing.

2. Bednasek's decision to withhold a copy of his birth certificate does not create standing.

In *Fish I*, the Court held that the plaintiffs' injury was not self-inflicted because their alleged injury was based on being forced to comply with a law they alleged was entirely preempted by the National Voter Registration Act and therefore invalid. *See Fish v. Kobach*, 840 F.3d 710, 716 n.5, 753 (2016) (*Fish I*). Bednasek's equal protection claim is based on a different sort of injury though—the burden the proof of citizenship law allegedly imposed on him. *See* Response Br. at 58-59. The cancellation of Bednasek's voter registration application alone is not a cognizable injury for purposes of claiming an undue burden on his right to vote; he must show a real burden on his right to vote. But for Bednasek, that burden was nonexistent.

Bednasek argues that the proof of citizenship law imposed an undue burden on his right to vote because he "*does not have* his birth certificate." Response Br. at 56. But the record confirms he *did* obtain it later; he simply chose not to provide it. Specifically, he had it and provided it when applying to the Navy's officer candidate school. J.A. 9352, 9369. He even testified that "nothing . . . prevents [him] from presenting [his] birth certificate to the county election office if [he] chose to do so." J.A. 9375-9376. Thus his voter registration application was cancelled not because of any burden—undue or otherwise—imposed by Kansas law on Bednasek but because he affirmatively chose not to comply with the law. *See* J.A. 9349. That choice undermines any claim to a cognizable injury.

Bednasek attempts to distinguish *Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013). But if anything, his alleged injury is even less real than in *Clapper*. There, the plaintiffs' alleged injury was caused by their decision not to communicate with their clients based on a speculative fear that the communications would be intercepted by the United States' surveillance program, and the Court held they did not have standing. Here, in Bednasek's own words, the only reason he did not comply with

the proof of citizenship requirement is because, "I don't agree with the . . . requirement." J.A. 9352; *accord* J.A. 9349.

Neither *Meese v. Keene*, 481 U.S. 465, 475 (1987) nor *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) offers any support for Bednasek's theory of standing. They do not say that a plaintiff like Bednasek who takes a step to manufacture an injury—here, withholding required proof of citizenship—has standing.

3. The Kansas League cannot salvage Bednasek's equal protection claim.

If this Court concludes that Bednasek lacks standing, the District Court lacked jurisdiction to reach Bednasek's equal protection claim and dismissal is required. Not so, says the League of Women Voters of Kansas ("Kansas League"). Instead, they suggest (without authority) that—after a trial occurred, judgment was entered, a notice of appeal filed, and with appellate briefing underway—it can seek leave to amend its complaint under Federal Rule of Civil Procedure 15(b) to assert an equal protection claim it never alleged below. *See* Response Br. at 58 n.14. That argument is meritless. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009) (rejecting the argument that supplemental pleadings should be considered after a notice of appeal had been filed). And the Kansas

League does not point to any evidence that would support its claim to standing.

B. *Crawford* demonstrates that Kansas's proof of citizenship law is constitutional.

Kansas's proof of citizenship law survives the *Anderson-Burdick* balancing test for the same reasons as Indiana's voter identification law in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).[1] Kansas shares the same interests that justified Indiana's law, and the burden imposed by the Kansas law is no more severe than in *Crawford*. The District Court erred because it failed to faithfully apply *Crawford* and, instead, effectively followed Justice Souter's *Crawford* dissent.

[1] Bednasek accuses the State of "[r]elying principally on Justice Scalia's non-controlling concurrence in *Crawford*." Response Br. at 60. But that mischaracterizes the State's Opening Brief. The State expressly argued that its law is constitutional under Justice Steven's plurality opinion in *Crawford*. *See* Opening Br. at 24-37. It then offered an alternative argument that the Kansas law should be upheld under Justice Scalia's concurring opinion. Justice Scalia's approach, the State argued, "provides the better approach to evaluating equal protection claims in this context" because it "is more faithful to traditional equal protection case law and better reflects the deference the Voter Qualifications Clause requires that States receive in setting and enforcing" those qualifications. Opening Br. at 38-40.

Bednasek now invites this Court to do the same. This Court should decline his invitation.

1. The State's interests are the same as in *Crawford*.

The same interests the Supreme Court found sufficient to support Indiana's photo identification law in *Crawford* are equally sufficient to justify Kansas's proof of citizenship law: (i) protecting the integrity of the electoral process, (ii) ensuring the accuracy of voter rolls, (iii) safeguarding voter confidence, and (iv) protecting against voter fraud. Opening Br. at 33-37. Bednasek claims the Kansas law actually undermines these interests because the law may prevent some eligible applicants who are unwilling to provide proof of citizenship from registering to vote. But the photo identification law in *Crawford* surely prevented some registered voters from voting; yet the Supreme Court found these interests sufficient to justify the law at issue there. While Plaintiffs' policy preferences may undermine *their* confidence in Kansas's law, many Kansas voters feel differently, as shown by the Kansas Legislature's passage and retention of the law. Kansas's law helps ensure that everyone who does vote is actually a citizen, thereby advancing the State's interests.

2. The burdens here are no more severe than in *Crawford*.

The burdens of Kansas's proof of citizenship law are not any more severe than the burdens in *Crawford*. In *Crawford*, the Supreme Court held that the "inconvenience of making a trip to the BMV, gathering the required documents," including a "primary document" like a birth certificate, and "posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198 & n.17. If gathering a birth certificate and other documents to obtain a photo ID was not a substantial burden in *Crawford*, showing proof of citizenship to register to vote is not a substantial burden here.

Bednasek argues that this case is distinguishable because Indiana's photo IDs were free. But in *Crawford* the Court recognized that obtaining a photo ID required a document like a birth certificate, and that there were costs (between $3 and $12 in Indiana) to obtain a birth certificate for those who did not already have one. *Id.* at 198 n.17. This case is no different.

Likewise, Bednasek's argument that most people do not carry their birth certificate ignores the fact that Indiana's law required a document

like a birth certificate to obtain a photo ID. Kansas's law does not require voters to carry their proof of citizenship to the polls; they only need to provide proof of citizenship once when initially registering to vote. This is even less burdensome than Indiana's requirement—which required voters to produce a document like a birth certificate at the time of obtaining a photo ID—in that Kansas law allows prospective voters to apply for registration and then gives them up to 90 days to later provide proof of citizenship in person, by mail, or by electronic means. J.A. 11440-41; Kan. Admin. Regs. § 7-23-15. In addition, the Secretary of State's agreement with the Kansas Department of Health and Environment further reduces the burden for many prospective voters by crosschecking the suspense list with the Office of Vital Statics to determine whether that office possesses proof of the applicant's citizenship. J.A. 11445.

Bednasek repeatedly references the 30,732 applicants whose registrations were suspended or cancelled, but this fails to demonstrate that Kansas's proof of citizenship law imposes a substantial burden. In *Crawford*, the district judge estimated that 43,000 citizens did not have photo identification when the law was passed. As Bednasek notes, the Supreme Court did not find this statistic problematic in part because the

statistic said "nothing about the number of free photo identification cards issued since then." *Crawford*, 553 U.S. at 202 n.20. The same point is true here. The 30,732 number cited by Bednasek only represents the number of prospective voters whose applications were suspended or cancelled at a particular date in time, specifically March 31, 2016. At least some of those individuals ultimately would have become registered even if the preliminary injunction had not been entered. After all, applicants on the suspense list have up to 90 days to provide proof of citizenship, and even if they do not do so, their citizenship may be confirmed by other means, such as the crosscheck program with the Office of Vital Statistics. J.A. 11445. And even those whose applications are cancelled can later reapply and provide proof of citizenship; they are not forever barred from registering.

More importantly, the number of applicants on the suspense list does not demonstrate that the Kansas law imposes a substantial burden; it is equally possible these applicants are simply unwilling to bear burdens no greater than "the usual burdens of voting." *Crawford*, 553 U.S. at 198. After all, of the 30,732 suspended or cancelled applicants, 75% were motor-voter applicants. J.A. 11449. Many of these may have

answered "yes" when asked whether they wanted to register to vote to appear to be responsible citizens, even though they had no real intent or desire to vote. The fact that 88% of applicants—nearly 9 out of 10—were able to provide proof of citizenship demonstrates that the Kansas law does not impose a severe burden on voters generally. It is not unreasonable to believe that most, if not all, of the remaining applicants were simply unwilling to bear even a slight burden, due to voter apathy or otherwise. Nor should we lose sight of the possibility that *some* of the applicants failed to produce proof of citizenship because they are not, in fact, qualified to vote—precisely what the statute is designed to accomplish.

The proper focus is not on the number of applicants who were not registered, but on the *actual burden* the proof of citizenship law imposes. And as noted above, the burden of producing proof of citizenship in Kansas is actually less than the burden of providing a birth certificate to obtain a photo ID in *Crawford*.

Of course, as in *Crawford*, there may be a "small number of voters who may experience a special burden" because they "cannot afford or obtain a birth certificate." 553 U.S. at 200. But *Crawford* found this

prospect insufficient to invalidate the law because "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* The same is true here. As the district court noted, "[t]here is no evidence about how many canceled and suspended applicants in fact lack" documentary proof of citizenship. J.A. 11457. Of the 30,732 suspended or cancelled applications, Bednasek has identified only 2 applicants who allegedly cannot afford or obtain a birth certificate.

The first, Donna Bucci, was born in Maryland and testified that the cost of a replacement birth certificate would impair her ability to pay rent. But the cost of a birth certificate in Maryland is only $10, plus the cost of a postage stamp if requested by mail. *See* https://health.maryland.gov/vsa/Pages/fees.aspx; https://health.maryland.gov/vsa/Pages/birth.aspx. The minimal cost of obtaining a birth certificate for those who do not already have one cannot be considered a substantial burden, especially since providing proof of citizenship is a one-time requirement. In addition, many applicants may ultimately need a copy of their birth certificate for other purposes (such as obtaining a Real ID

compliant driver's license required to board an airplane starting October 1, 2020, *see* https://www.ksrevenue.org/dovrealid.html).

And even if the minimal cost of obtaining a birth certificate could be considered a substantial burden for indigent applicants, Bednasek's solitary example of an applicant allegedly unable to afford a birth certificate "gives no indication of how common the problem is." *Crawford*, 553 U.S. at 202. As in *Crawford*, "the record does not provide even a rough estimate of how many indigent voters lack copies of their birth certificates." *Id.* at 202 n.20. Thus, it is not possible to conclude "that the statute imposes excessively burdensome requirements on any class of voters." *Id.* at 202 (quotation marks omitted).

The only other individual Bednasek identifies who allegedly was unable to obtain a birth certificate, Steven Wayne Fish, was born on a decommissioned Air Force base in Illinois and testified that he did not know how to obtain a copy of his birth certificate. But from his testimony, it appears that the extent of his effort was a Google search. J.A. 9383. There is no indication that he reached out to the Illinois Department of Public Health, Division of Vital Records to determine whether they could provide a copy. And if that was unsuccessful, Fish could have requested

a hearing before the State Election Board to explain his unique predicament. In any event, there is no evidence that Fish's situation is a widespread problem. The entire Kansas proof of citizenship law should not be facially invalidated because of the unique circumstances of one individual. *See Crawford*, 553 U.S. at 202-03.

Bednasek argues that the Kansas law imposed a severe burden on him personally not because he was unable to obtain or afford a birth certificate, but because his birth certificate was at his parents' house in Texas. And so he would have had to take the allegedly onerous step of asking his parents to either put it in the mail or email him a picture of it. But *Crawford* held that the process of "gathering the required documents" (like a birth certificate) for a photo identification card and making a trip to the BMV "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198. And, as noted above, Bednasek subsequently obtained his birth certificate to apply to officer candidate school and could have easily presented it to the county election office. J.A. 9352, 9369, 9375-9376.

In addition to the two individuals who were allegedly unable to afford or obtain proof of citizenship, Bednasek identifies two other plaintiffs in *Fish* (Charles Stricker and Thomas Boynton) who testified that they took their birth certificates with them while applying for Kansas driver's licenses in 2014 but were not registered to vote due to failure to provide proof of citizenship. It is unclear what happened, but there has been no showing that this was a common problem. And in any event, the Kansas Secretary of State and the Kansas Department of Revenue (which oversees the driver's license application process) agreed to an interagency policy in May 2016 that now gives the Secretary of State's office and county election officials access to a secure internet portal whereby they may check the Division of Vehicles' database to determine if the Division possesses proof of citizenship for an applicant. J.A. 11446. And the Division of Vehicles' procedure is to scan all documents an applicant provides during a driver's license application process into that database. J.A. 11442. Thus, whatever happened with Stricker's and Boynton's applications is unlikely to recur and provides no basis for permanently enjoining the Kansas law. In fact, it appears both

Stricker and Boynton were ultimately registered because their proof of citizenship was found in the Division of Vehicles' records. J.A. 11463-65.

Bednasek has not shown that Kansas's proof of citizenship law imposes a substantial burden on any class of voters. And because the law's "broad application to all . . . voters imposes only a limited burden on voters' rights," the "precise interests advanced by the State are therefore sufficient to defeat [Bednasek's] facial challenge" to the Kansas law. *Crawford*, 553 U.S. at 202-03 (quotation marks omitted).

3. Kansas law provides an effective safety valve related to registration.

Bednasek also argues that the Kansas law is unconstitutional because, unlike in *Crawford*, it does not offer a post-election opportunity or "safety valve" to provide proof of citizenship. Kansas law does, however, provide a safety valve tied to the registration process.

Kansas does not require proof of citizenship at the time of the election, so the relevant question is not whether there is a post-election safety valve. Rather, the question is whether there is an effective post-*application* safety valve. And there is. *See* Opening Br. at 31. A person who applies to register to vote but does not provide proof of citizenship is given 90 days to provide proof of citizen to the county election office. J.A.

11446; Kan. Admin. Regs. § 7-23-15. The Secretary of State has instructed county election officers to contact applicants on the suspense list at least three times during this 90-day period, and applicants may provide proof of citizenship in person, by mail, or by electronic means (including email and text message). J.A. 11440-41, 11446.

In addition, those who cannot obtain one of the thirteen types of proof of citizenship listed in Kan. Stat. Ann. § 25-2309(l) may request a hearing before the State Election Board to demonstrate by other means that they are a citizen. *See* Kan. Stat. Ann. § 25-2309(m). Bednasek claims that this process is burdensome and rarely used, but the process is only intended as a safety valve for those truly unique situations where a person is unable to obtain proof of citizenship for whatever reason. Bednasek exaggerates the burden of the process,[2] but whatever burden the process entails is fully justified in these unusual situations.

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[2] In particular, Bednasek's claim that an applicant must become a "friend" of the Deputy Secretary of State in order to use the hearing process, *see* Response Br. at 71, is a gross distortion of the record. Jo French, an applicant who participated in the hearing process, testified that she became a friend of the Deputy Secretary of State as a result of the process. J.A. 10302. But there is no support for Bednasek's suggestion that she was required to become the Deputy Secretary's friend or that she received special treatment because of any friendship.

4. The documentary proof of citizenship requirement is evenhanded.

Kansas's proof of citizenship law is an evenhanded regulation because it applies to all voters registering for the first time after its enactment. Bednasek argues that the law unconstitutionally discriminates against new voters by applying only prospectively. But this Court described the law in *ACLU of New Mexico v. Santillanes,* 546 F.3d 1313 (10th Cir. 2009) as "especially even-handed" despite the fact that it only applied to in-person and not absentee voters. *Id* at 1321-22. Like the law in *Santillanes*, the Kansas "law's distinction is proper." *Id.* at 1321. Even Bednasek agrees that the State has a legitimate interest in protecting the reliance interests of those who are already registered to vote. Response Br. at 76. In fact, the district court rejected Bednasek's equal protection challenge to this distinction for precisely this reason. J.A. 13365-68.

Plus, "States may . . . 'take reform one step at a time,' and need not 'cover every evil that might conceivably be attacked." *Santillanes*, 546 F.3d at 1321 (brackets omitted) (quoting *McDonald v. Chicago Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969)). The State has a legitimate interest in avoiding the logistical difficulties of collecting proof of

citizenship from the over one million registered voters in Kansas in order to allow them to remain registered. By requiring proof of citizenship from new applicants going forward, the Kansas law will eventually ensure that every voter has provided proof of citizenship.

Bednasek claims that the law has been unequally applied because the Secretary of State registered some individuals—including plaintiffs—to vote. Although Bednasek describes this as a plot of "picking off plaintiffs," the record shows that these individuals were registered in accordance with generally applicable programs. For instance, former plaintiff Cody Keener was registered after his birth certificate was verified through the crosscheck program with the Kansas Office of Vital Statistics. J.A. 13342. And plaintiffs Stricker and Boynton were registered when their proof of citizenship documents were located in a Department of Revenue, Division of Vehicles database, which the Secretary of State and county election officials may now access under an interagency agreement that took effect in May 2016. J.A. 11463-65.[3]

[3] The notice sent to Mr. Stricker stated that his Kansas birth certificate was found in the Office of Vital Statistics, despite the fact that he was born in Missouri, but the Sedgwick County Election Commissioner testified that she believes his citizenship document was found in the Division of Vehicles database. She explained that her office had not

At most, the Secretary of State's actions were an attempt to resolve plaintiffs' legal claims by addressing their grievances that the Kansas law had prevented them from registering to vote. Even if this were somehow an unconstitutional implementation of the law, it would be no basis for invalidating the law in its entirety. Rather, the proper remedy would be to enjoin the unconstitutional implementation. After all, this alleged problem has nothing to do with the law itself.

II. The NVRA does not preempt Kansas law.

Kansas's proof of citizenship law is not only constitutional, it is also consistent with the NVRA. The State's Opening Brief offered two reasons why Section 5 of the NVRA did not preempt Kansas law. The State first argued that the text of the NVRA gives States discretion to require information, like proof of citizenship, that they reasonably deem necessary to enforce their voter qualifications. *See* Opening Br. at 41-57. The State also argued that, even if this Court applied the test in *Fish I*, reversal is required because the District Court erred in concluding that

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updated the generic notice sent to applicants whose proof of citizenship was verified to include the Division of Vehicles database check. J.A. 11463.

the State did not produce sufficient evidence to justify its validly enacted state law. *See* Opening Br. at 57-64. Plaintiffs' arguments to the contrary are unconvincing.

A. Section 5 of the NVRA does not preclude a State from enforcing its voter qualifications.

The Qualifications Clause permits the States to establish voter qualifications. *See* Opening Br. at 45-53. And because "the power to establish voting requirements is of little value without the power to enforce those requirements," it would raise serious constitutional concerns "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 17 (2013). The NVRA avoids these constitutional concerns by allowing States to require proof of citizenship.

1. Section 5 authorizes the State to obtain information necessary to assess applicants' qualifications to vote.

Nothing in the text of Section 5 of the NVRA expressly precludes a State from requiring documentary proof of citizenship to register to vote. To the contrary, the statute expressly authorizes States to obtain the information necessary "enable State election officials to assess the

eligibility of the applicant . . . .” 52 U.S.C. § 20504(c)(2)(B)(ii). As argued in the State’s Opening Brief, this allows States to require and consider proof of citizenship when they reasonably determine that proof of citizenship is necessary to enforce their citizenship qualifications. Opening Br. at 45-49 (explaining that the phrase necessary confers discretion upon the state election officer).

Section 20504(c)(2)(B) confirms that States retain discretion to obtain the eligibility information they deem necessary. *See* Opening Br. at 47-50. The word “necessary” should not be read as “strictly necessary,” the State argued, because the statute authorizes the state election official to determine what is necessary in his or her State.

Plaintiffs’ Response Brief complains that recognizing the statutory discretion Congress afforded the States “would render the phrase ‘only the minimum amount’ a nullity.” Response Br. at 48. Not so. The phrase “only the minimum amount of information necessary” means a State can require no more information than is necessary, but that only begs the question of what information is “necessary” and who should make that determination. Again, the text answers both questions. Congress tasked “[e]ach State” with making the determination as to what is necessary. 52

U.S.C. § 20504(c)(1). And Congress directed that this judgment is constrained only by what information is needed to "enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20504(c)(2)(B)(ii). This is consistent with the Supreme Court's interpretation of the Qualifications Clause, which gives each State the ability "to establish voting requirements" as well as the power to "obtain[] the information necessary to enforce its voter qualifications." *Inter Tribal*, 570 U.S. at 17; *see also* Opening Br. at 47 (citing authority demonstrating the Supreme Court's recognition that the NVRA provides room for the States to make policy choices deemed appropriate).

2. *Fish I* is inconsistent with the text of Section 5.

In arguing that the State cannot require proof of citizenship, Plaintiffs rely on the test created by this Court in *Fish I*, but that test is inconsistent with the statutory text.

Fish I began with the presumption that the attestation of citizenship required by 52 U.S.C. § 20504(c)(2)(C) is the "minimum amount of information necessary" to assess an applicant's citizenship for purposes of 52 U.S.C. § 20504(c)(2)(B). *See Fish I*, 840 F.3d at 738.

Plaintiffs support that presumption. But it is found nowhere in the plain language of the statute. To the contrary, in § 20504(c)(2)(B), Congress expressly authorized States to require information necessary to assess applicants' qualifications *in addition to* the attestation required by 52 U.S.C. § 20504(c)(2)(C). Were the attestation alone sufficient to determine an applicants' eligibility, then the authorization to require additional information in § 20504(c)(2)(B)(ii) would be redundant. Far from creating a presumption that the attestation is sufficient, § 20504(c)(2)(B)(ii) contemplates that States may require additional information beyond the attestation to assess applicants' eligibility. Because the text of § 20504(c)(2) contains no presumption that the attestation is the minimum amount of information necessary to ensure voter qualifications, neither this Court nor Plaintiffs are at liberty to impose such a presumption upon the States. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . ."); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) ("[W]here the text is clear, as it is here, we have no power to insert an amendment.").

Nor does anything in the text of the NVRA support *Fish I*'s requirement that in order to require proof of citizenship a State must show that a substantial number of noncitizens have registered to vote and that there are no other alternative means of ensuring applicants' qualifications. Section 20504(c)(2)(B)(ii) authorizes States to require information necessary to determine the qualifications of *every applicant*; it does not say that States may only require information necessary to ensure the qualifications of *most* applicants, or even the overwhelming majority of applicants. *Fish I*'s substantial-number-of-applicants standard was created from whole cloth.

Plaintiffs argue that the law of the case doctrine requires this Court to follow *Fish I*'s analysis. They claim that this Court's decision in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004), only applies to situations where the prior decision was made by a motions panel. Although the context in which *Homans* was decided involved a prior decision by a motions panel, the holding was not so limited. Instead, the Court held that the law of the case doctrine "is discretionary rather than mandatory." *Id.* at 904. And *Homans* noted that "[c]ourts repeatedly have emphasized that a decision as to the likelihood of success is

tentative in nature and not binding at a subsequent trial on the merits." *Id.* (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.")). "Were the opposite true, an unacceptable conflation of the merits decision and the preliminary inquiry would result." *Id.*

3. Legislative history cannot overcome the text of the NVRA.

Plaintiffs argue that their reading of § 20504(c)(2)(B) is correct because Congress declined to include a provision that would have given States express permission to demand documentary proof of citizenship. Response Br. at 46 n.10. But it is just as likely that a majority of Congress believed that such a provision would have been superfluous given the lack of an express prohibition on requiring proof of citizenship. In fact, when Senator Simpson offered an amendment that would explicitly allow States to require documentary proof of citizenship, Senator Ford, the primary sponsor of the bill in the Senate, stated: "[T]here is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship. I think basically this is redundant . . . . [T]here is nothing in there now that would preclude it." 139 Cong.

Rec. S2902 (daily ed. Mar. 16, 1993). As is often the case, the legislative history here is unhelpful and open to different interpretations. *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 391-96 (2012) (collecting legal criticisms of attempting to divine the intent of a legislative body based upon anything but the text of the law receiving bicameral approval and the signature of the President given the multitude of motivations each lawmaker has in voting for or against a particular piece of legislation). And whatever Congress's motivation, the text of the statute does not expressly preempt the Kansas law. *See* Opening Br. at 47-48 (citing *Young v. Fordice*, 520 U.S. 273, 286 (1997), and *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000)); *accord Inter Tribal*, 570 U.S. at 9 (the power of Congress to preempt state law is paramount, but only "so far as it is exercised, and no farther").

4. The canon of constitutional avoidance supports the State's position.

Plaintiffs assert that preventing States from requiring proof of citizenship would pose no constitutional concern because "the *process* by which a person proves that she is qualified" to vote is exclusively within the federal government's Elections Clause authority. Response Br. at 48.

The Supreme Court disagrees: As the Supreme Court recognized in *Inter Tribal*, "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 570 U.S. at 17. States have exclusive authority to prescribe voter qualifications, *id.*, and the Kansas Legislature has determined that requiring proof of citizenship is necessary to enforce those qualifications. That conclusion is well supported. *See* Opening Br. at 57-62. Although Plaintiffs argue otherwise because the State has allegedly not proven that a substantial number of noncitizens have registered to vote, the State is entitled to ensure the qualifications of *all* voters. There is no *de minimis* exception to the Constitution.

5. The State's reading of Section 5 is consistent with the overall scope and context of the NVRA.

The connection Congress made between driver's license applications and applications for voter registration, when viewed alongside Section 8's obligation to register only an "eligible applicant," confirms that the States have authority to insist upon proof of eligibility. *See* Opening Br. at 53-55. Plaintiffs contend that the State waived this argument and, in any event, it is wrong.

The State has consistently argued that Section 5 allows it to require applicants to provide documentary proof of citizenship. The State is not asserting that Section 8 is an independent or even an alternative basis for this authority. Rather, Section 8 demonstrates that the State's interpretation of Section 5 is consistent with the overall scope and context of the NVRA. *Cf. United States v. Burkholder*, 816 F.3d 607, 614-15 & n.6 (10th Cir. 2016) (dismissing the dissent's concern that focusing on the broader context of the statute was inappropriate because the fundamental canon of statutory construction requires that the words of a statute must be read in their context and with a view toward their place in the overall statutory scheme).

Plaintiffs claim the State "gets Section 8 precisely backwards." Response Br. at 51. But Plaintiffs' argument is belied by the text of the NVRA and the common understanding of the very concept of an application. The NVRA imposes on States the duty to "ensure that any *eligible* applicant is registered to vote." 52 U.S.C. § 20507(a)(1) (emphasis added). The State therefore must be able to request the information it deems necessary to determine whether an applicant is "eligible." *See* 52 U.S.C. § 20504(c)(2)(B)(ii). Just as the Supreme Court recognized "that

not every submitted Federal Form will result in registration," *Inter Tribal*, 570 U.S. at 11, not every application for a Kansas driver's license or motor-voter registration will result in registration either. If an applicant fails to satisfy the eligibility criteria, the State must deny the application. *See id.* at 15 n.7 (chastising the dissent for overlooking the fact that the NVRA "only requires a State to register an '*eligible* applicant'" (emphasis in original)).

B. The State presented sufficient evidence to justify its law even under the test created by *Fish I*.

Even under the test created by *Fish I*, the State presented sufficient evidence to justify its law requiring documentary proof of citizenship. *See* Opening Br. at 57-64. Plaintiffs disagree, based largely on their subjective assessment that the problem non-citizen registration was insufficient to justify the State's concerns and Plaintiffs' belief that their preferred alternatives to requiring proof of citizenship should have been adopted. That strict-scrutiny-like restriction on States' discretion robs States of their sovereign authority to establish and verify qualifications of voter eligibility.

1. The State has shown that a substantial number of noncitizens have attempted to register to vote.

In *Fish I*, this Court held that the State needed to present evidence of a "substantial number" of noncitizens attempting to register to vote before it could require documentary proof of citizenship. But the Court did not define "substantial." The District Court held—and Plaintiffs argue—that fewer than 200 voters or 0.002% of registered voters is insufficient.

The District Court, without any basis in the law, treated the inquiry as one of raw numbers. But that ignores the fact that elections can and often do come down to only a handful of votes. *See* Opening Br. at 60-61; *see also* Jason Beets, The Salina Journal (Nov. 20, 2018), *available at* http://www.salina.com/news/20181120/township-clerk-elections-decided-by-coin-flip (last visited December 11, 2018) (describing how the results of the elections for clerks of two different Kansas townships were tied and decided by separate coin flips). Indeed, during the pendency of this appeal, an election for governor of Kansas was decided by 343 votes out of 317,165 cast, and at least 5 elections for state representatives were decided by fewer than 100 votes. *See* http://kssos.org/elections/18elec/PrimaryElectionOfficialResults.pdf (Republican gubernatorial

primary election); http://kssos.org/elections/18elec/2018_General_Election_Official_Votes_Cast.pdf (house districts 2, 40, 48, 72, and 111). Plaintiffs do not dispute that the evidence the District Court found is sufficient to upset the results of local, statewide, and national elections. When the problem of noncitizen voters can affect the outcome of elections, that problem cannot be considered insubstantial.

2. *Fish I*'s suggestion that a State must prove that no alternatives exist is non-binding dicta.

In *Fish I*, this Court suggested (but did not decide) that even if the State were able to demonstrate that a substantial number of noncitizen registrations had occurred, a State would also have to establish that no other alternative but requiring proof of citizenship would be effective. *See Fish I*, 840 F.3d at 738 n.14. The State argued that this standard is not binding because it was pure dicta and would be an improper imposition of a strict-scrutiny test upon the State. *See* Opening Br. at 62-64.

Plaintiffs' Response is muted on this point. They (wisely) do not challenge the notion that this standard is anything but dicta that does not bind this panel. *See generally Exby-Stolley v. Board of County Comm'rs, Weld County, Colo.*, 906 F.3d 900, 911 (10th Cir. 2018)

(recognizing dicta, even well-intentioned, is not binding as circuit precedent).

Instead, Plaintiffs contend that the "no other alternative" standard is merely an application of the principles of preemption. Response Br. at 49. But they fail to identify where such a burden is located in the text of Section 5 or explain how it is consistent with the text of the NVRA. It is not. While § 20504(c)(2)(B)(ii) allows States to require only the minimum amount of information necessary to assess applicants' qualifications, nothing in the text prevents States from requiring this information just because methods *apart from the application* (like prosecutions of illegal voters) might help prevent ineligible voters from registering. Under the NVRA, a state election official must be able to determine whether an applicant is eligible to vote. *See* 52 U.S.C. § 20504(c)(2)(B)(ii); *id.* § 20507(a)(1). Allowing ineligible applicants to register and then later prosecuting them for doing so, possibly after an election, is no substitute for requiring proof of an applicant's eligibility, and certainly not a substitute required by the plain language of the statute.

CONCLUSION

The State of Kansas respectfully requests that this Court reverse the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's December 12, 2018, order providing that Appellant may file a reply brief that contains up to 9,750 words because this brief contains 7,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font.

CERTIFICATE OF DIGITAL SUBMISSION

I certify that a copy of the foregoing Reply Brief, as submitted in digital form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Sophos Endpoint Security and Control (version 10.8), last updated December 21, 2018. According to the program, the document is virus free. No privacy redactions were necessary in this document.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on December 21, 2018, the foregoing Reply Brief was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven paper copies to be delivered by Federal Express to the Clerk's Office within two business days of this filing.

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